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Supreme Court of the United States

71-529

HARLAN ALEXANDER BLACKBURN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
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Petitioner submits herewith his jurisdictional statement as required by Rule 23 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion below was decided by the United States Court of Appeals for the Fifth Circuit, Blackburn vs. United States, Case No. 30933, on July 15, 1971, attached hereto as Appendix.

GROUNDS FOR JURISDICTION

Petition for Writ of Certiorari to the Supreme Court of the United States is brought pursuant to 28 USC 1254(1).

United States Court of Appeals for the Fifth Circuit rendered its opinion on July 15, 1971. Petition for Rehearing was denied in Order of the same court on September 14, 1971.

QUESTION PRESENTED

Whether the Petitioner was denied due process of law and the benefits of Title 18 U.S.C.A. §3500.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States Fifth Amendment:

"Criminal actions – Provisions concerning — Due process of law and just compensation clauses.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process or law; nor shall private property be taken for public use, without just compensation."

Also Section 3500 U.S.C.A. provides:

> "(A) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the Defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

"(B) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

"(C)) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire test of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial."

"(D)) If the United States elects not to comply with an order of the court under paragraph (B) or (C) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion of justice require that a mistrial be declared."

"(E)) The term 'statement,' as used in subsections (B), (C), and (D) of this section in relation to any witness called by the United States means —

"(1) A writen statement made by said witness and signed or otherwise adopted or approved by him; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT OF THE CASE

The Defendant, Harlan Alexander Blackburn, was indicted on two separate counts for a violation of Title 18, United States Code, Section 1952, that is, for knowingly and willingly using a facility of interstate commerce in the furtherance of a gambling interprise operated in violation of the laws of the State of Florida. The first Count alleged the Defendant used the telephone as a means to promote and further a state gambling operation. The second Count alleged the Defendant used the United States mail as a means to promote and further a state gambling operation. The Indictment was filed and returned at Orlando, Florida, on March 24, 1969. The Defendant was arraigned and pleaded not guilty to each Count of the Indictment on April 10, 1969.

Subsequent to the arraignment, the Defendant, through his attorney, filed, among other discovery motions, a Motion to Furnish Evidence Favorable to the Defendant and a Motion to Provide Copies of Investigative Reports. The former Motion was granted in part and denied in part, that is, it was granted on the requirement that said information need not be provided to the Defendant until such time as the Government concludes its direct examination of the party in question. The Motion to Provide Copies of Investigative Reports was denied.

As stated in the opinion of the Circuit Court of Appeals, the Petitioner operated a gambling enterprise in Florida consisting of illegal bookmaking and lottery activities. The Government's star witness, McCormick, had served the F.B.I. as a paid informer for approximately four years. During that time McCormick worked closely with defendant in the daily operations of his state-wide gambling empire. At trial defendant requested all statements made by McCormick to the F.B.I. covering the entire period. The Government furnished defendant with all statements made by McCormick to F.B.I. agents which related to McCormick's testimony on direct examination. These statements were in the form of investigative reports containing memoranda of agents' interviews with McCormick.

There was no testimony by the star witness, McCormick to aid the trial court in reaching the decision that the reports were not adopted or proved by him and therefore not within the scope of the *Jencks Act*. The trial court refused to require production of the reports.

ARGUMENT

It has been uniformly held by our Federal Judiciary that the Jencks Act, 18 U.S.C.A. § 3500, has the singular purpose of furthering the fair and just administration of criminal justice. *Campbell v. United States,* Mass. 1961; 81 S.Ct. 421, 365 U.S. 85; 5 L.Ed,2d 428. See also *Campbell v. United States,* Mass. 1963, 83 S.Ct. 1356, 373 U.S. 487, 10 L.Ed. 2d. 501. Clearly, then, it is disclosure rather than suppression, of relevant material that promotes equality in the administration of our criminal system. *United States v. Youngblood,* C.A.N.Y. 1967, 379 F.2d 365.

Subsection (E) (1) of 18 U.S.C.A. § 3500, the Jencks Act states,

> (E) The term "statement," as used in Subsections (B), (C) and (D) of this section in relation to any witness called by the United States means
>
> > (1) A written statement made by said witness and signed *or otherwise adopted or approved by him;* of . . . (emphasis mine).

At the trial of this cause former FBI Agent James B. Hafley testified on a proffer of evidence that during that period of time from 1964 through 1968 he had met regularly with the witness McCormick, a paid informer of the FBI, and obtained information from him concerning the activities of the Defendant which he reduced to written notes and, subsequently, to formal reports.

The singular issue before the Court in this Point, then, is whether or not the witness McCormick did, in fact, ". . . otherwise adopt(ed) or approve(d) . . ." the statements he had given to Hafley. Excerpts of Hafley's proffer clearly indicate the adoption and/or approval by McCormick of the information he had given. These particular excerpts beginning at page 1015 of the transcript of testimony relating to Hafley's proffer are worthy of including:

BY THE GOVERNMENT:

"Q. Now, would you please tell the Judge what your procedure was in accepting information which Mr. McCormick gave to you?

A. I would meet with Mr. McCormick and have him furnish me information about cases under investigation. He would furnish the information to me orally. I would make handwritten notes on the information that he would give me. I would then go over the notes with him to make certain that I had the information correct. Thereafter, we would part and I would return to my office and prepare appropriate interview forms on the result of the information in the particular cases.

Q. Were these reports of interview prepared after — at a later date than the time that you had your conversation with Mr. McCormick?

A. They were usually prepared the same date.

Q. And you would review these notes with Mr. McCormick to be sure there was nothing erroneous related to you?

A. Correct.

Q. At least what you reported?

A. That is true."

(Continuing at page 1021 by the Defense)

"Q. So, as a matter of fact your records that you kept are accurate representations of what Mr. McCormick told you, are they not?

A. I feel they were accurate, yes sir.

Q. They were, although not precisely verbatim accounts of it, they were contemporaneously. At the time the statements were given, were they not, or on the same day or approximately the same period of time?

A. I feel they reflect substantially what he told me, if that is what you mean.

Q. You were even so careful as to go over with him what he said so that they would be accurate, did you not?

A. Yes sir.

Q. So, would it be fair to say Mr. Hafley that the reports that you have, regardless of what government form they happen to be on are a clear, precise and somewhat exact statement in narrative form of what Mr. McCormick told you?

A. I feel they were accurate Mr. Kirkland. Of course, I am human and it is possible there could have been some slight difference, but I feel it is substantially correct and they still are and today those reports reflect what Mr. McCormick said.

Q. Those reports reflect what Mr. McCormick told you, do they not?

A. I feel that they do."

(Continuing at page 1023 by the Defense)

"Q. So the FD-302 is an extension of this form that was furnished us, it is merely an extension of what he said except on a different form?

A. Yes sir.

Q. And to your knowledge, sir, did Mr. McCormick review the information furnished on this FD-302 before is was turned over to me by the Government?

A. He did not read the form itself, no sir, as I said.

Q. He didn't adopt this one, did he?

A. As I explained before, he did go over my notes and my notes were used in preparing that FD-302."

That this testimony constitutes an adoption by McCormick of the information given is even more apparent when compared with the ruling case law on the subject. The leading case is *Campbell v. United States,* Mass. 1963, 83 S.Ct. 1356, 373 U.S. 487, 10 L.Ed.2d 501. The facts in *Campbell* stated briefly are as follows:

After a trial in the United States District Court for the District of Massachusetts, the defendants were convicted of bank robbery. The conviction was affirmed by the Court of Appeals for the First Circuit, but on certiorari the Supreme Court of the United States, in *Campbell v. United States,* (1961) 365 U.S. 85, 5 L.Ed. 2d 428, 81 S.Ct. 421 vacated the Court of Appeals' judgment while allowing the conviction to stand pending a redetermination of the defendants' motion for the production of an FBI interview report under the Jencks Act (18 U.S.C. § 3500), which requires the production of a written statement of a government witness when signed or otherwise adopted or approved by him after the witness has been called by the United States and has testified on direct examination. The District Court held that the FBI interview report was not producible (206 F. Supp. 213), and the Court of Appeals for the First Circuit agreed but remanded for further findings. (296 F.2d 527). At the second hearing, before a different judge, the District Court concluded that the report was producible, finding that an FBI agent questioned the witness, recited back to the witness the substance of the witness' account, referring to the agent's

notes of the interview, received the witness' assurance that he had got it straight, and seven hours later dictated the report in question primarily from his notes but also from memory. (199 F. Supp. 905). The Court of Appeals accepted the second judge's findings but held that the report was not producible. (303 F.2d 747).

On Certiorari, the Supreme Court of the United States vacated the judgment of the Court of Appeals and the judgment of conviction. In an opinion by BRENNAN, J., expressing the views of six members of the Court, it was held that the interview report was producible under § 3500 (E) (1), as a written statement made by the witness and adopted by him, since the agent's oral recitation from his notes might fairly be deemed a reading back of the notes and the interview report might fairly be deemed a copy of the notes.

Justice Brennan, speaking for the majority in *Campbell*, stated that the producibility of the FBI reports under § 3500 (E) (1) would depend upon the answers to two questions: First, whether Toomey's oral version of the notes may fairly be deemed a reading back of the notes to the witness Staula; and, secondly, whether the Interview Report may fairly be deemed a copy of the notes, The Court answered both questions in the affirmative. The Court's rationale in reaching that decision is significant.

First, the Court laid down the guideline that in determining whether or not such reports are admissible there must be a complete factual hearing; that is, that both the interviewing agent and the consenting witness testify to determine whether or not the report was "adopted" or "approved" by the witness. This was not done in the first *Campbell* hearing but was in the second. Similarly, in the case at bar, the witness McCormick did not testify in any way whatsoever on the Government's proffer as to whether or not he adopted or approved the statements or notes of Agent Hafley. Certainly, it would appear that the best

evidence of whether the information given Hafley was adopted or approved by McCormick would be to hear from McCormick himself. This was not done in the present case; the Court simply ruled on the question on the basis of Hafley's testimony alone. This was a patent error. This is precisely what the District Court in *Campbell* had initially done and was one of the reasons the matter was remanded for further hearing.

Secondly, the Court in *Campbell* held Toomey's "reading back" of his notes to Staula constituted an adoption and that the formal Interview Report was fairly deemed simply a copy of the original notes taken by Toomey. Clearly, then, Hafley's ". . . go(ing) over the notes with him (McCormick) to make certain I had the information correct . . ." was a "reading back" according to the *Campbell* decision.

The case at bar squares all four corners of the *Campbell* decision. Hafley testified to "go(ing) over with McCormick the notes he had obtained from him and that the formal report (FD-302) he made up contemporaneously with the interview was merely a formal recitation of the original notes taken. According to this testimony, particularly the unilateral testimony of Hafley alone, without any testimony from the witness McCormick, it is difficult to determine how the trial court considered the reports not to be producible under § 3500 (E) (1).

The Courts have not yet gone so far, and hopefully they will not reach that point, as to hold that the witness must sign or formally acknowledge the final report of the Federal Bureau of Investigation. See *Ogden v. United States,* C.A. Cal. 1962, 303 F.2d 724, reh, den., 323 F2d 818 cert. den., 84 S.Ct. 1137, 376 U.S. 973; *United States v. Tomaiola,* C.A.N.Y. 1960, 280 F.2d 411.

If this Court were to hold that the action of McCormick did not constitute an adoption the effect on future similar situations would be disasterous and far reaching. Such

conduct would no doubt then be used routinely as a device by the prosecution and its investigating officers to effectively circumvent the intended purpose of the Jencks Act and thereby deny the Defendant access to possibly his most effective impeachment material. Such a decision would ultimately give birth to the unwritten policy of investigators that all statements should be taken with complete accuracy but they should in no way allow the consenting witness to adopt or otherwise approve the statement.

Furthermore, the Congress in its wisdom has struck a fine balance between the prosecution and defense in criminal actions. Realizing the prosecution has the means and manpower of the entire United States Government in the preparation of its cases and in order to offset this tremendous advantage, Congress has formulated and made available to the defense discovery devices such as the Jencks Act. Therefore, if this particular Act is held to be as narrow and confining as the trial court holds it to be, then that precarious balance between the prosecution and defense has been destroyed at the expense of the defendant.

CONCLUSION

For the aforesaid reasons, Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

Edward R. Kirkland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition have been served upon the Solicitor General, Department of Justice, Washington, D. C., 20530, this 13th day of October, 1971.

Edward R. Kirkland
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Orlando, Florida 32801
Attorney for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30933

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARLAN ALEXANDER BLACKBURN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

(July 15, 1971)

Before COLEMAN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge: Blackburn appeals from a judgment entered upon a jury conviction for knowingly and willingly using facilities of interstate commerce in the furtherance of an illegal gambling enterprise in violation of 18 U.S.C.A. § 1952. Defendant argues that the trial judge committed reversible error: (1) in ruling that certain F.B.I. investigative reports were not within the purview of the Jencks Act, 18 U.S.C.A.

§ 3500, thereby denying his right of access to the reports; (2) in refusing to examine into the deliberations of the jury; and (3) in requiring two witnesses to testify in spite of his claim of the attorney-client privilege.

I.

Blackburn operated a gambling enterprise in Florida consisting of illegal bookmaking and lottery activities. The Government's star witness, McCormick, had served the F.B.I. as a paid informer for approximately four years. During that time McCormick worked closely with defendant in the daily operations of his statewide gambling empire. At trial defendant requested all statements made by McCormick to the F.B.I. covering the entire period. The Government furnished defendant with all statements made by McCormick to F.B.I. agents which related to McCormick's testimony on direct examination. These statements were in the form of investigative reports containing memoranda of agents' interviews with McCormick.

The trial court conducted an extensive hearing during which it examined F.B.I. agents Hafley and Smith, informer McCormick, and the Government's prosecuting attorney to determine whether the voluminous reports concerning the four year period could possibly have contained Jencks Act statements. Smith explained that as a matter of established F.B.I. procedure, these reports were prepared by the agent who interviewed the witness. After making notes of the conversation, the agent would return to his office and write down his version of the conversation. Finally, the report would be filed with the F.B.I.

Agent Hafley, who actually conducted the interviews with McCormick over the four years, testified in effect that he followed this established procedure in every detail in conducting interviews with McCormick. In composing the reports, Hafley stated, he never quoted McCormick directly, unless perhaps it was a particular trade term that might be used in the gambling world. Otherwise, the reports were in his words; not in the words of McCormick. Moreover, McCormick never signed any notes, statements or reports. Hafley summarized by stating that these reports "were substantially my interpretations of the interview with Mr. McCormick and the information he had given me." McCormick testified that he only gave verbal information to the agent, that the written reports were not his reports, and that he had never seen any of them.

The trial court refused to require production of the reports.

As we said in *Matthews v. United States*, 5 Cir. 1969, 407 F.2d 1371, *cert. denied*, 1970, 398 U.S. 968:

> It is the primary duty of the trial judge to determine the producibility of a statement under the Jencks Act. Scales v. United States, 367 U.S. 203, 258, 81 S.Ct. 1469, 6 L.Ed.2d 782. Although his ruling is subject to appellate review, it is sustainable unless clearly erroneous.
>
> The trial judge is granted substantial latitude in determining producibility, including

> authority to interrogate either the witness or the government agent or conduct an *in camera* inspection.

Id. at 1376; *Lloyd v. United States*, 5 Cir. 1969, 412 F.2d 1084, 1088.

Our review of the record impels the conclusion that the trial court's inquiry of the witnesses was sufficient without an *in camera* inspection of voluminous reports covering a four-year period, to determine that the reports were not adopted or approved by McCormick, and that, except for the reports tendered by the Government, there were none which related to the subject matter of McCormick's testimony. The trial court's determination concerning the producibility of the reports under the Jencks Act was not clearly erroneous. *Campbell v. United States*, 1963, 373 U.S. 487, 493; *United States v. Graves*, 5 Cir. 1970, 428 F.2d 196, 200, *cert. denied*, 400 U.S. 960.

II.

After the jury returned a verdict of guilty, defense counsel moved for a new trial alleging that one of the jurors had telephoned an associate of defendant and had told her that the jury foreman had "harassed them pretty strong." At the post-trial hearing, the juror flatly denied this allegation. The trial judge then denied defendant's request that the court interrogate the other jury members to determine if such pressure had actually been exerted by the foreman. Defendant's argument that the trial court abused its discre-

tion by refusing to inquire into the deliberations of the jury is without merit. The record is barren of any showing of juror misconduct. In any event, the jury's verdict of guilty cannot be impeached by the fact that a juror may have been influenced by the improper remark of a fellow juror. *Klimes v. United States*, D.C. Cir. 1959, 263 F.2d 273. "The jury should not be exposed to post-verdict fishing expeditions into their mental processes with the hope that something will turn up." *Dickenson v. United States*, 5 Cir. 1970, 421 F.2d 630, 632; *see United States v. Stoppleman*, 1 Cir. 1969, 406 F.2d 127, 130, *cert. denied*, 395 U.S. 981; *United States v. Grieco*, 2 Cir. 1958, 261 F.2d 414, *cert. denied*, 359 U.S. 907.

III.

Finally, defendant's assertion — that the trial judge erred in requiring witnesses Murasko and Kelly to testify over his claim of an attorney-client privilege — requires little comment. Murasko and Kelly, both attorneys, had represented defendant in prior dealings. As to Murasko, the record clearly supports the trial judge's ruling that defendant expressly waived the privilege in the presence of Kirkland, his trial counsel, and government attorneys at a meeting prior to trial in Kirkland's office. "[W]hen the client and attorney themselves, for purposes beneficial to the client, lift the veil, they cannot lower it again." *United States v. Shibley*, S.D. Cal. 1953, 112 F. Supp. 734.

The communications between defendant and Kelly were not privileged, since third persons were present

at the time the communications were made. *See Caffritz v. Koslow*, D.C. Cir. 1948, 167 F.2d 749, 751.

The judgment of the District Court is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

FILED
ORLANDO, FLA.
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No. 30933

D. C. Docket No. 69-30-Orl.Cr.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARLAN ALEXANDER BLACKBURN,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before COLEMAN, GOLDBERG and DYER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 15, 1971

Issued as Mandate: SEP 30 1971

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A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Claudette Strayer
Deputy
New Orleans, Louisiana SEP 30 1971

U. S. COURT OF APPEALS
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SEP 14 1971
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30933

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARLAN ALEXANDER BLACKBURN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

September 14 , 1971

ON PETITION FOR REHEARING

Before COLEMAN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied